



ALAN WILSON
ATTORNEY GENERAL

September 10, 2020

Joseph C. Wilson, IV, Esq.
City Attorney
City of Folly Beach
PO Box 178
Folly Beach, SC 29439

Dear Mr. Wilson:

You have requested an opinion of this Office regarding dual office holding. You state the following:

The City of Folly Beach's City Administrator recently won office to the South Carolina General Assembly. She is resigning her position as City Administrator prior to being sworn in to her new position with the General Assembly. However, the City would like for her to remain an employee of the City for one to three months to assist in her transition completely away from the City. During that period, her title would be "Transition Coordinator" or similar; she would report to the Mayor and City Administrator, and she would be engaged in the following duties:

- Transition duties including training new Administrator, and organizing files and documents;
- Project coordination, including liaison on construction projects, including a City Hall renovation and pedestrian path construction;
- Review of Freedom of Information Act requests and responses; -City communications;
- Assisting with various administrative and scheduling duties . . .

Further down the road, after she has ended her employment with the City, the former City Administrator may also contract with the City of Folly Beach City Attorney to assist with the City's legal

issues. This work would not include any criminal or prosecutorial matters, which are not handled by the City Attorney but by a separate prosecutor. Rather, she would most likely be assisting the City Attorney with on-going civil litigation involving the City, on a contract and case-specific basis . . .

You have kindly provided us with the City of Folly Beach ordinances regarding the City Administrator and the City Attorney.

LAW/ANALYSIS

In S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013), the South Carolina Supreme Court stated:

“[t]he South Carolina Constitution prohibits members of the General Assembly from holding another office during their service in the legislature, both expressly and by virtue of the repeated general prohibitions against dual office holding. *See* S.C. Const. art. III, § 24 (“No person is eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State....”); S.C. Const. art. VI, § 3 (“No person may hold two offices of honor or profit at the same time.”); S.C. Const. art. XVII, § 1A (“No person may hold two offices of honor or profit at the same time....”).

We must therefore determine whether the positions you described in your letter are offices. The Court explains that an “office” for dual office holding purposes is:

“One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer.” Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907), “In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that “[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.” Willis v. Aiken County, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). “The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority ...”63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010).

Other relevant considerations for an office are:

whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.

Op. S.C. Atty. Gen., 2013 WL 3243063 (June 17, 2013) (quoting State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980)).

In your letter, you state that the City of Folly Beach would like to employ this individual as a “Transition Coordinator” for a short time. On a number of occasions, this Office has stated that a member of the General Assembly may also hold a position of state or local employment, consistent with the dual office provisions of the State Constitution. See Ops. S.C. Atty. Gen., 1984 WL 250017 (Dec. 10, 1984); 1984 WL 250014 (Nov. 26, 1984). In Sanders v. Belue, 78 SC 171, 174, 58 SE 762 (1907), the Court defined an “employee” as follows:

One who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee.

Citing Sanders, we explained in a prior opinion why an assistant county administrator was an employee and not a public officer:

The Spartanburg County Assistant Administrator's position is not created by statute, county ordinance or other law and he is appointed by the County Commission to perform such duties as directed by the County Administrator. He serves at the will of, and has no authoritative power other than that delegated by the County Administrator.

Op. S.C. Atty. Gen., 1969 WL 15749 (Dec. 30, 1969).

Similarly, the Transition Coordinator position described by you is not created by statute or ordinance. The holder of the position reports to the Mayor and City Administrator and performs specific duties. The duties are not defined by either statute or ordinance and they do not appear to be an exercise of the sovereign power of the State. Accordingly, it is our opinion that the

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Transition Coordinator is an employee. It would not be dual office holding for this individual to be employed as Transition Coordinator by the City of Folly Beach while serving as a member of the General Assembly.

You are also asking if the same individual, after she has ended her employment as Transition Coordinator, can contract with the City Attorney to assist with the City's civil legal issues. From your description, the position is an employee, as defined by the Sanders case, rather than a public officer. The position is not created by statute or ordinance. The individual would contract with you, as City Attorney, to assist you with the City's civil cases and would be subject to your direction. The duties to be performed are not defined by statute or ordinance and they do not appear to involve an exercise of the sovereign power of the State. We therefore believe that it would not violate the prohibition against dual office holding for this individual to contract with you, as City Attorney, to assist you with the City's civil cases while serving as a member of the General Assembly.

You may wish, however, to contact the State Ethics Commission to confirm that there are not any conflicts of interest. Our Office defers to the Ethics Commission on ethical issues since it was given authority by the Legislature to interpret and issue opinions pertaining to the Ethics Act. See S.C. Code Ann. § 8-13-320(11) (1976 Code, as amended).

CONCLUSION

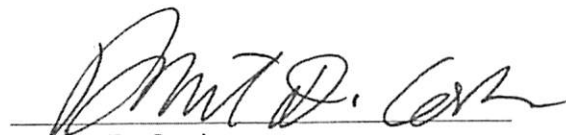
In our opinion, it would not be a violation of the constitutional prohibition against dual office holding for an individual to be both a member of the General Assembly and an employee, as defined by Sanders v. Belue, 78 SC 171, 58 SE 762 (1907), of the City of Folly Beach. You may wish, however, to contact the State Ethics Commission to confirm that there are not any conflicts of interest.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General